

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

vs.

MOTOROLA, INC., et al.,

Defendants.

MOTOROLA MOBILITY LLC, et al.,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendants.

Case No. C10-1823-JLR

MICROSOFT'S 8/5/13
MOTION TO SEAL

**NOTED FOR:
FRIDAY, AUGUST 16, 2013**

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Exhibit 2 to the Declaration of Chris Wion in Support of Microsoft's Opposition to Defendants' Motions *in Limine* ("Wion Declaration"), which consists of an excerpt of Charles Donohoe's testimony from the November 2012 trial;

MICROSOFT'S 8/5/13 MOTION TO SEAL - 1

No. C10-1823

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(2) Exhibit 7 to the Wion Declaration, which consists of one page from Motorola's October 4, 2012 Pretrial Statement; and

(3) Those portions of Microsoft's Opposition to Defendants' Motions *in Limine* (the "Opposition") that reference Exhibits 2 or 7 to the Wion Declaration.

Microsoft seeks to file the foregoing materials under seal because they have been marked as "Confidential" by Motorola under the terms of the protective order issued in this case. Microsoft takes no position with respect to whether these documents should remain under seal.

II. LCR 5(g)(3)(A) CERTIFICATION

Shane Cramer (on behalf of Microsoft) and Andrea Pallios Roberts (on behalf of Motorola) met and conferred by telephone on August 5, 2013 in an effort to minimize the amount of material to be filed under seal in connection with this motion. As a result, the parties were able to reduce the number of documents to be filed under seal.

III. FACTS & AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by orders dated October 3, 2012 and July 25, 2013, Microsoft is permitted to file materials designated by either party as Confidential Business Information¹ under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be

¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

A party seeking to seal a judicial record attached to a dispositive motion must articulate “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This presumption may be overcome only on a compelling showing that the public’s right of access is outweighed by the interests of the public and the parties in protecting the court’s files from public review.

However, “the public interest in understanding the judicial system would appear to be less where ... the documents in question are irrelevant to the Court’s decision.” *Network Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at *2 (N.D. Cal. Mar. 10, 2010) (citing *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing on the

1 resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-
2 dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

3 “In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a
4 vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.”
5 *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598
6 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*
7 *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at *1-2 (W.D. Wash. Mar. 4, 2010)
8 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade
9 secret may consist of any formula, pattern, device or compilation of information which is used
10 in one’s business, and which gives him an opportunity to obtain an advantage over competitors
11 who do not know or use it.” *Id.*, 2010 WL 786021, at *2 (quotations omitted).

12 **B. Microsoft Seeks to Seal Certain Documents at Motorola’s Request.**

13 Motorola has requested that Microsoft file Exhibits 2 and 7 to the Wion Declaration
14 under seal because they disclose Motorola’s confidential business information.² Pursuant to
15 the terms of the protective order, Microsoft has filed these documents under seal. Microsoft
16 also is filing its Opposition under seal because it references these documents. All such
17 references have been redacted from the publicly-filed version of Microsoft’s Opposition.

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19 ///

20 ///

23 ² Microsoft is also filing under seal an unredacted copy of Exhibit 5 to the Wion Declaration, which is an
24 excerpt from the Expert Report of Gregory Leonard, dated May 29, 2013. The Court already has ruled that the
25 sentence in Exhibit 5 that has been redacted from the publicly-filed version meets the relevant standard and should
remain under seal. *See* Dkt. No. 793 (Order granting Microsoft’s request to seal Exhibit 6 to the July 3, 2013
Wion Declaration).

1 **IV. CONCLUSION**

2 For the reasons set forth herein, Microsoft respectfully requests that the Court grant its
3 motion. A [Proposed] Order Granting Microsoft's 8/05/13 Motion to Seal has been submitted
4 herewith.³

5 DATED this 5th day of August, 2013.

6 **RESPECTFULLY SUBMITTED,**
7 **CALFO HARRIGAN LEYH & EAKES LLP**

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³ Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as Confidential Business Information in accordance with the terms of the protective order. Microsoft expressly reserves the right to do so as the circumstances warrant.

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CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On this 5th day of August, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 5th day of August, 2013.

/s/ Florine Fujita

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